(1)

Supreme Court, U.S.
FILED

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In The

Supreme Court of the United States

ALEX EFROSMAN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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44 pp

QUESTIONS PRESENTED

1. Whether the lower courts committed a reversible error by allowing a federal prosecutor to use stealth, *ex parte* telephone calls to cause the U.S. Bureau of Prisons to deprive petitioner of his *vested* credit for prior custody in a French prison, under 18 U.S.C. § 3585.

2. Whether the lower courts committed reversible error by denying petitioner's right to procedural and substantive due process in the administrative process before the U.S. Bureau of Prisons in connection with prior-custody credit applications.

3. Whether the lower courts committed reversible error by holding that petitioner had "waived" his constitutional challenge to the U.S. Bureau of Prisons actions.

LIST OF PARTIES

The parties below were the government; and Alex Efrosman, as defendant.

CORPORATE DISCLOSURE

Not applicable.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
LIST OF PARTIES	ii
CORPORATE DISCLOSURE	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	v
PETITION FOR A WRIT OF CERTIORARI	1
OPINIONS BELOW	1
STATEMENT OF JURISDICTION	1
RELEVANT CONSTITUTIONAL PROVISION	2
RELEVANT STATUTES	2
STATEMENT OF THE CASE	2
REASONS FOR GRANTING A WRIT	10
I THE COURT SHOULD REVIEW SECOND CIRCUIT DENIAL OF PROCEDURAL AND SUBSTANTIVE DUE PROCESS VIOLATION AGAINST PETITIONER, AFFECTING A CLEAR AND UNAMBIGUOUS ACT OF CONGRESS EMBODIED IN 18 U.S.C. § 3585(b)	11
A. Petitioner was Deprived of Due Process	11
B. Petitioner Suffered Vindictive Prosecution	14
C. Petitioner Served Double the Term he Would have Served in France, and *was Denied Any Credit in the United States*	15

TABLE OF CONTENTS – Continued

Page

II BECAUSE THE PROSECUTOR INVOLVED IS A HIGH-RANKING SUPERVISOR OF NUMEROUS OTHER PROSECUTORS IN THE SOUTHERN DISTRICT OF NEW YORK, AFFECTING POTENTIALLY MYRIAD CASES, THE SECOND CIRCUIT'S FAILURE TO VALIDATE PETITIONER'S DUE PROCESS RIGHTS WARRANTS THIS COURT'S SUPERVISORY REVIEW 18

III AGREEING TO THE DISTRICT COURT'S JURISDICTION TO REVIEW THE ADMINISTRATIVE AGENCY'S DENIAL OF RELIEF WAS NOT A "WAIVER" OF "PROCEDURAL" RIGHTS 18

CONCLUSION 19

TABLE OF AUTHORITIES

Page

CASES

Alexander v. Perrill, 836 F. Supp. 701 (D. Ariz. 1993) 12

Blackledge v. Perry, 417 U.S. 21 (1974) 14

Doe v. Simon, 221 F.3d 137 (2d Cir. 2000) 13

North Carolina v. Pearce, 395 U.S. 711 (1996) 14

Paradise v. CCI Warden, 136 F.3d 331 (2d Cir. 1998) 14

Rosemond v. Menifee, 137 F. Supp.2d 270 (S.D.N.Y. 2000) 11

United States v. Johnson, 171 F.3d 139 (2d Cir. 1999) 14

United States v. King, 126 F.3d 394 (2d Cir. 1997) 14

United States v. El-Jassem, 819 F. Supp. 166 (E.D.N.Y. 1993) 11

United States v. Labeille-Soto, 163 F.3d 93 (2d Cir. 1998) 14, 17

United States v. Olano, 507 U.S. 725 (1993) 19

United States v. Wilson, 503 U.S. 329 (1992) 13, 14

CONSTITUTION

U.S. Const., Amend. V 2

TABLE OF AUTHORITIES – Continued

Page

STATUTES

18 U.S.C. § 3585 ..... 2, 11

18 U.S.C. § 3585(b) 13

28 U.S.C. § 1254(1) 1

OTHER AUTHORITY

Richard S. Frase, *Comparative Criminal Justice as a Guide to American Law Reform: How Do the French Do It, How Can We Find Out, and Why Should We Care?* 78 Ca. L. Rev. 545 (1990) 16

PETITION FOR A WRIT OF CERTIORARI

Honorable Chief Justice Rehnquist and Associate Justices of the Supreme Court of the United States:

Petitioner Alex Efrosman respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered March 28, 2003.

OPINIONS BELOW

The memorandum-opinion and judgment of the U.S. Court of Appeals for the Second Circuit was entered March 28, 2003, *infra*, Appendix A. The order of the U.S. District Court for the Southern District of New York was entered November 5, 2002, *infra*, Appendix B. The judgment in the district court case was entered on November 4, 2000. *Infra* Appendix C.

STATEMENT OF JURISDICTION

Judgment of the court of appeals was filed March 28, 2003. The Court has jurisdiction under 28 U.S.C. § 1254(1) and Rule 13.1 of the Supreme Court Rules.

RELEVANT CONSTITUTIONAL PROVISION

U.S. Const., Amend. V

No person shall . . . be deprived of life, liberty, or property, without due process of law;. . . .

RELEVANT STATUTES

18 U.S.C. § 3585. **Calculation of a term of imprisonment**

(b). **Credit for prior custody.** – A defendant shall be given credit toward the service of a term of imprisonment for any time he has spent in official detention prior to the date the sentence commences –

(1) as a result of the offense for which the sentence was imposed; or

(2) as a result of any other charge for which the defendant was arrested after the commission of the offense for which the sentence was imposed;

that has not been credited against another sentence.

STATEMENT OF THE CASE

Background

Efrosman is a naturalized United States citizen, A00036, who pleaded guilty to mail and wire fraud in the Southern District of New York, Judge Jed S. Rakoff, on October 30, 2000. Judgment of conviction was entered November 4, 2000.

The charges stemmed from certain events which occurred on or about July 31, 1997. His pre-sentence

report (PSR), placed him in offense level 24 with a criminal history category 1, with a guideline range of imprisonment at 51 to 63 months. Although the Probation Office recommended a sentence of 57 months, *see* PSR at 31, the district court ordered Mr. Efrosman to the guideline *maximum* of 63 months, plus supervised release and substantial restitution.

The Southern District Warrant

In 1997, Efrosman was charged with mail and wire fraud, and an arrest warrant was issued out of the Southern District of New York. At that time, he was residing in Paris, France. On June 16, 1998, Efrosman was arrested in Paris on an unrelated French charge.

The Extradition Custody in France

Ten days after Efrosman's arrest, the French prosecutor wrote a letter to the United States government, stating:

> I have the honor to make you aware of the placing in *extraditional custody* in the jail of La Sante as of June 26, 1998: [M. EFROSMAN] . . .
>
> *after the provisory custody application made by the Judiciary Authorities of the United-States by virtue of a warrant (n' 97 MAG 1735) delivered September 3rd, 1997, by Judge ANDREW J. PECK*, Southern District of NEW YORK, for the offense of malefactors association in the aim of committing an offense of swindling by postal and telegraphic ways. [Emphasis added.]

A00076.

Efrosman was extradited to the United States on February 18, 2000, and continued to be held in custody, first at Metropolitan Detention Center in Brooklyn, and later at Metropolitan Correctional Center in Manhattan. Efrosman pleaded guilty. He continued to be in custody until his sentencing, and thereafter, based on the Southern District warrant executed by the French authorities. Thus, his total period of actual incarceration before sentencing was approximately sixteen months.

The Sentencing

On November 1, 2000, Efrosman was sentenced to the *maximum* term of imprisonment under the Sentencing Guidelines, despite the fact that this was a non-violent, white collar case predicated on the mail and wire fraud statutes. At the sentencing hearing, there was a discussion about the *execution* of Efrosman's sentence: BOP's exclusive role was specifically discussed, with Judge Rakoff specifically stating the settled, black-letter law, that the execution of sentence will be entirely in the jurisdiction of BOP: "I'm not going to get into that. I think that's for the Bureau of Prisons to deal with, not this court." Sentencing Tr. 11-1-00, at 12, A00144.

Efrosman's Model Behavior

Efrosman was a model inmate at both the French and U.S. prisons. While at Allenwood Federal Correctional Center, he successfully completed a 500-hour Drug Abuse Program, A00086, a 40-hour Drug Abuse Education Course, A00088, the ADAPT Program, A00090, a 20-hour Cage Your Rage Program, A00092, and others. He taught GED to other inmates, and he was recognized for societal

contributions to National Liberty Month, A00094, and others.

The Initial BOP Administrative Review

In late 2000/early 2001, months into Efrosman's sentence, Efrosman filed an administrative petition with the Bureau of Prisons, seeking review of his prior custody. BOP conducted a complex review of Efrosman's sentence. As stated in the Efrosman Declaration dated October 29, 2002 – which was wholly uncontroverted:

> 4. When I was extradited to the United States, I was housed at Metropolitan Detention Center in Brooklyn. Between approximately December 2000 and April 2001, I was transferred to and housed in Metropolitan Correctional Center (MCC) until approximately my transfer to the Federal Correctional Center in Allenwood, Pennsylvania. While at MCC, I recall submitting a form prescribed by the U.S. Bureau of Prisons, which I believe to be Form BP-8, in which I sought prior-custody credit against my sentence. I was assisted by Unit Manager Christine Dyman, who, in turn, dealt with the head case manager of my floor, for this request.
>
> 5. Because my request involved issues relating to French legal process, it is my understanding that the request was submitted to BOP headquarters in Washington, DC. It is also my understanding that the Office of BOP's General Counsel in Washington, or its international law officer, reviewed my application, studied the issues, and granted my application.
>
> 6. As part of my moving submission, Exhibit F1 is a Sentence Monitoring Computation Sheet

> dated 01-02-2001. At this time, I was still at MCC and I was then in the process of seeking prior-custody credit. Exhibit F2 shows that on the Computation Sheet dated 02-20-2001, prior-custody credit was awarded, as follows: "CREDIT, SPECIFICALLY, JUNE 26, 1998 THROUGH FEBRUARY 17, 2000."
>
> 7. It is my understanding that BOP Computation Sheets were provided to me on a quarterly basis. I received several Computation Sheets but was unable to retain all of them, but I recall that all of the BOP Computation Sheets except the last one dated September 30, 2002, consistently recognized BOP's award of credit in the 02-20-2001 Computation Sheet.

A00124.

BOP subsequently notified Efrosman that he was being credited for his prior custody served in France, while awaiting extradition to the United States on the underlying charges, apparently as stated in the French prosecutor's notice, quoted above. According to BOP's determination, Efrosman was to be discharged on October 4, 2002. A00096.

It is subject to judicial notice, and indeed even posted on the BOP website, (*see* www.bureauofprisons.gov), that BOP's Washington personnel includes the Office of BOP General Counsel with a full staff of lawyers. There is no mechanism for any participation by an assistant United States attorney in the BOP procedures for reviewing a sentence for credit. After Efrosman was informed that his discharge would be effective on October 4, 2002, A00096, his prior-custody credit *vested*.

Following its initial determination in February 2001, BOP consistently reaffirmed Efrosman's release date to be "October 4, 2002," in each and every subsequent quarterly Sentence Monitoring Computation Sheet kept in its files and provided to an inmate. Several of such forms are part of the record below. *See* A00096 ff.

On April 9, 2002, Efrosman was released to a six-month term to be served at the halfway house in Brooklyn, New York. *See* A00100.

The Prosecutor's Stealth Calls to BOP

In September 2002, AUSA Douglas Jensen, who prosecuted petitioner, received what amounts to a complaint from a "witness" to the underlying case that petitioner was getting off too easy. The complaint appears to have been sent to a Postal Inspector, and then to AUSA Jensen, as the assigned prosecutor. A00114 ff.

AUSA Jensen apparently sided with the "witness" and made efforts to prolong petitioner's incarceration. He made *stealth*, *ex parte* telephone calls to BOP officials. There are no written communications; no documentation from either AUSA Jensen or BOP; and no objective indicia as to what was discussed and how BOP was persuaded to flip-flop. The only evidence of this comes from the prosecutor's own admission, in the government's briefs submitted below, admitting that *ex parte* calls were made for the stated purpose.

BOP's Flip-Flop

The effect of those *ex parte* telephone calls by the prosecutor was that, on September 30, 2002, approximately a week before Efrosman's final release from custody, for the first time since he was sentenced, BOP issued a correction Computation Sheet, *Exhibit H*, showing that his prior custodial credit had been denied for the period June 26, 1998, to September 6, 1999, approximately fifteen months. Petitioner was provided no notice or opportunity to be heard, before being deprived of his prior-custody credit.

Efrosman's BOP Petition for Correction

On October 8, 2002, through his current counsel, Efrosman sought BOP's correction of its improper flip-flop based on an undocumented, improper request from the prosecutor. A00026 ff. These materials, including Michael Kimm's cover letter to BOP Case Agent, Steve Floit, were submitted with the moving papers.

On October 10, 2002, Floit acknowledged receiving the petition and acknowledged it had been forwarded to BOP's own legal department. Kimm's confirmation letter states:

> I represent Mr. Alex Efrosman, and I write to confirm our telephone conversation today.
>
> I telephoned you at approximately 8 AM and spoke with you for three or four minutes. *You advised me that Mr. Efrosman's papers had been "sent to the legal department," and that you would have to await its determination on the "simple question" whether Mr. Efrosman is "either entitled to credit or not."* When I asked for the name of the person in charge of Mr. Efrosman's

> file at the legal department, you declined to provide this information. When I asked you whether Mr. Efrosman's prior determinations of credit had been done by you, you stated that you would not discuss this other than to say that you had been working at BOP for the past three years. If you disagree with this summary, please advise. (Emphasis added.)
>
> As Mr. Efrosman's lawyer, I believe that I am not only entitled to know the legal department counsel handling this matter, but that I should speak with him or her. I therefore reiterate my request for this information, and ask you to kindly pass this request to the appropriate person.

See 00011 & Exhibit I, 00012.

Despite the fact that Efrosman specifically requested the name of the "legal department" representative handling this matter, agent Floit not only declined to respond during the October 10 telephone call, but, now some twenty days later, there has been no follow up of any kind – while Efrosman, who was to have been released on October 5, 2002, remains in custody without any objective explanation.

Efrosman's Petition for Judicial Review

On October 16, 2002, Efrosman sought judicial review by order to show cause submitted on October 16, 2002, seeking reversal of BOP's September 30, 2002, reversal of its proper prior-custody credit determinations. *See* A00001 ff.

The government responded with a mere letter-memorandum, totally bereft of evidential materials. *See* A00114 ff. Thus, the record was uncontroverted. The government's primary objection was procedural, that appellant had failed to exhaust his administrative remedies.

Oral argument was held on October 31, 2002, on the undisputed record before the district court. *See* Transcript of 10-31-02, where the district court proceeded to address the merits.

The district court issued a conclusory decision denying Efrosman's petition totally bereft of facts and totally unsupported by law, and silently denied Efrosman's appellant's motion for release pending review.

A notice of appeal was filed on November 5, 2002, A00154, and the Court of Appeals affirmed on March 28, 2003.

REASONS FOR GRANTING A WRIT

Summary

1. The Second Circuit erroneous decision misunderstood a clear act of Congress embodied in 18 U.S.C. § 3585(b), and endorses due process violations in potentially myriad cases where prior-custody credit is sought by federal inmates.

2. Despite the fact that the Second Circuit's decision is unreported, because the prosecutor involved is a high-ranking official supervising numerous other prosecutors in the Southern District of New York, the Second Circuit's

failure to validate petitioner's due process rights warrants supervisory review.

I

THE COURT SHOULD REVIEW SECOND CIRCUIT DENIAL OF PROCEDURAL AND SUBSTANTIVE DUE PROCESS VIOLATION AGAINST PETITIONER, AFFECTING A CLEAR AND UNAMBIGUOUS ACT OF CONGRESS EMBODIED IN 18 U.S.C. § 3585(b)

A. Petitioner was Deprived of Due Process

18 U.S.C. § 3585 provides that credit for prior custody should be given for any prior detention resulting (a) from the offense for which sentence was imposed or (b) from any other charge for which the defendant was arrested after commission of the offense for which he was incarcerated.

Correct applications of prior custodial time implicates the due process clause of the Fifth Amendment to the Constitution and fundamental fairness. *E.g. Rosemond v. Menifee*, 137 F. Supp.2d 270 (S.D.N.Y. 2000).

It is beyond a genuine dispute that foreign jail time, arising from the underlying charges or related charges, is clearly a basis for prior custodial credit. In *United States v. El-Jassem*, 819 F. Supp. 166 (E.D.N.Y. 1993), where the case dealt with pre-extradition custodial credit, the court stated:

> Defendant urges that he should be given 451 days' credit towards his sentence for time spent in jail between January 16, 1991, when he was arrested in Italy, and April 12, 1992, when he was extradited to the United States. *Defendant will receive credit for time served in Italy in*

> *accordance with United States federal lenient practice. . . .*

The BOP's September 30, 2002, recalculation proceeded exclusively on the basis of a stealth, *ex parte* telephone call from the prosecutor who previously prosecuted the case, and was subsequently promoted to Deputy Chief of the Narcotics Section supervising many assistant prosecutors in the Southern District of New York. The recalculation was *not* based on objective information or documents, and was without any pre-deprivation notice to Efrosman. When petitioner sought to challenge the recalculation, it was met with a total silence, with the BOP refusing to respond to petitioner's October 8, 2002, petition for reinstatement of credit, much less grant substantive relief.

In *Alexander v. Perrill*, 836 F. Supp. 701 (D. Ariz. 1993), *vacated* (upon settlement), 872 F. Supp. 722 (1995), the court dealt with similar issues in relation to someone who was residing at a halfway house and attending a university.

> Here, Alexander had served and had been discharged from his sentence. He began improving his station by attending the University of Arizona while he completed a separate six month sentence at a half-way house. Without notice, he was arrested on what was incorrectly identified as a "parole violation" and returned to FCI-Tucson. No hearing of any kind was held. Rather, after being informed that his jail credits were being revoked, Alexander met with apathetic defendants who did not question the accuracy of the Central Office's determination.

Id. at 706.

Both the statute, 18 U.S.C. § 3585(b) and the most recent Supreme Court case construing the statute, *United States v. Wilson*, 503 U.S. 329 (1992), coupled with prevailing practice in the federal courts, provide that the sentencing judge may *recommend* the sentence but it is BOP's exclusive role to make final decisions concerning the execution of a sentence.

While sentencing judges are permitted to provide non-binding "recommendations," nowhere in the statutory scheme, in the case law or in the administrative procedures is there any grant of authority for the *prosecutor* to make any "recommendations," much less engage in stealth, *ex parte* telephone calls to cause a deprivation of prior-custody credit which previously vested. This matter is particularly troubling because the BOP has its own legal department, through which such credit-reviews are made. In petitioner's case, the BOP's February 2001 and subsequent quarterly Sentence Monitoring Computation Sheet notices confirmed petitioner's vested credits, as *reviewed and administered* by BOP, pursuant to the statute.

Efrosman was deprived of his expected release on October 4, 2002, with less than a week to go, without any prior notice or an opportunity to be heard. Because BOP's September 30, 2002, action was not supported, at minimum, by a notice of the possible deprivation, an explanation of BOP's likely decision, and an opportunity to dispute its likely decision, *cf. Doe v. Simon*, 221 F.3d 137 (2d Cir. 2000) (requiring notice, explanation and opportunity to be heard in an analogous state proceeding), the action violates basic due process.

The fact that the Second Circuit did not properly understand the case below is readily apparent from its

reliance on *United States v. Labeille-Soto*, 163 F.3d 93, 99 (2d Cir. 1998), which stands for the proposition that section 3585 does not allow for credit on federal sentence for time already credited against prior state sentence. Petitioner received no credit in France for any of the almost-16 "extraditional detainer" against his French charge.

B. Petitioner Suffered Vindictive Prosecution

The only possible motivation appears to be prosecutorial vindictiveness. The Court has long held that the due process clause is violated when vindictiveness plays any part in a prosecutorial or sentencing decision. *North Carolina v. Pearce*, 395 U.S. 711 (1996); *Blackledge v. Perry*, 417 U.S. 21 (1974). For this reason, even the appearance of vindictiveness must be avoided. *Pearce*, 395 U.S. at 725; *Blackledge*, 417 U.S. at 28; *Paradise v. CCI Warden*, 136 F.3d 331, 335 (2d Cir. 1998); *United States v. King*, 126 F.3d 394 (2d Cir. 1997), *cert. denied*, 523 U.S. 1024 (1998).

"Vindictive" may be "actual," where it is shown by direct evidence, such as in a prosecutor's statement, *United States v. Johnson*, 171 F.3d 139, 140 (2d Cir. 1999), or implicit, where a presumption of vindictiveness arises when the "circumstances of the case create a 'realistic likelihood' of prosecutorial vindictiveness." *Johnson*, 171 F.3d at 141.

Since it is settled law that the Bureau of Prisons has exclusive authority to compute sentencing credits, *United States v. Wilson*, 503 U.S. 329, 334-35 (1992), the question in this case is what role, if any, could the prosecutor legitimately play in requesting the BOP to change petitioner's sentence one week before his discharge, if it is not clearly an effort to prolong a defendant's imprisonment, in

violation of due process. Given BOP's repeated previous determinations that Efrosman was entitled to pre-extradition jail time credit, and given AUSA Doug Jensen's attempt to keep his "defendant" incarcerated for a longer duration than the BOP had determined after a thorough review of the case, the fact that he accomplished this end by means of stealth, *ex parte* telephone calls only five days before petitioner's release supports a clear inference of vindictiveness.

For this reason alone, the BOP's September 2002 modification of Efrosman's remaining time should be reversed.

C. Petitioner Served Double the Term he Would have Served in France, and was Denied Any Credit in the United States

It is settled that, in France, first-time offenders serve no more than one-half of their jail sentence. A00142, A00158. In this regard, Efrosman's French-law expert, Nicolas Salomon, provided a written statement explaining that, but for the Order for extradition custody issued before his French sentence was issued, petitioner "would have served 7 months and a half on his French charge." *See id.* The effect of serving 16 months, as petitioner in fact served in France, was to serve *double* the term petitioner would have served in France, but for the United States extradition detainer.

The French sentencing practices are well known to American scholars. For instance, Professor Frase states:

> . . . A French convict is generally eligible for parole after serving half of his sentence (reduced by good time allowances of up to three months per year served). . . .

Richard S. Frase, *Comparative Criminal Justice as a Guide to American Law Reform: How Do the French Do It, How Can We Find Out, and Why Should We Care?* 78 Ca. L. Rev. 545, 649 n.569 (1990).

The district court specifically invited the government to challenge this point advising the government to "hire an expert on French law or anything like that," 10-31-02 Tr. at 25, line 14, but the government declined. Having so declined, the record was undisputed that Efrosman would have served no more than seven and one-half months on his French charge, and that even this was *concurrent* with his extradition detention, which, according to the French prosecutor's letter, began on June 26, 1998.

Efrosman's French prison term of "15 months," for which he would have served seven-and-one-half months, did not even begin until *after* he was placed in extradition custody. Because Efrosman's "extradition order" was issued by the French courts *before* his French sentence, his 22 month incarceration in France was at least *concurrent* – for both the U.S. violation and for the French violation. At most, Efrosman's seven-and-a-half month French term may be excluded from the 22 month total he spent in La Sante before extradition. The seven-and-a-half month difference reduces his imprisonment to before October 4, 2002, and therefore Efrosman is entitled to be released.

In its conclusory two-paragraph decision, the district court stated that the BOP's "most recent determination was correct[]" and that this is based on "a close reading of the French documents. . . . " There is no explanation as to what French documents were considered, and certainly no explanation as to why such documents support the BOP's latter determination.

As to the Salomon Affidavit, despite the fact that there was no objection from the government as to form or substance, and the government effectively conceded the facts stated in the Salomon Affidavit, the district court unreasonably concluded that it was too "brief" to be entitled any weight. Salomon is a French lawyer discussing French sentencing practice. In the absence of an opposing expert's opinion that more elaboration was needed, the district court unreasonably construed that Salomon's "brief" treatment of a *simple* issue – whether French first offenders serve a full or partial sentence – was inadequate.

The district court questioned *not* the adequacy of Salomon's Affidavit, *see* 10-31-02 Tr. at 27-28, but whether *his* affidavit should be "discounted" because he was believed to have represented Efrosman in his French criminal matter. *Id.* Although Efrosman's current attorney (Michael Kimm) informed the court that Salomon had represented Efrosman's French matter, that mistaken representation was corrected by Salomon's own correction affidavit, A00151, stating that he had been retained on October 9, 2002, to address the French law question only.

The Second Circuit's review of the district court's order missed the substance of the case, erroneously relying on *United States v. Labeille-Soto*, 163 F.3d 93, 99 (2d Cir. 1998), and resulted in a memorandum-order that simply did not address the question whether a prosecutor may use *stealth* telephone calls to adversely affect defendants they had prosecuted.

II

BECAUSE THE PROSECUTOR INVOLVED IS A HIGH-RANKING SUPERVISOR OF NUMEROUS OTHER PROSECUTORS IN THE SOUTHERN DISTRICT OF NEW YORK, AFFECTING POTENTIALLY MYRIAD CASES, THE SECOND CIRCUIT'S FAILURE TO VALIDATE PETITIONER'S DUE PROCESS RIGHTS WARRANTS THIS COURT'S SUPERVISORY REVIEW

Despite the fact that the Second Circuit decision below is unreported, it will have widespread consequences in the Second Circuit, particularly in the Southern District of New York.

The prosecutor in question, now a Deputy Chief of the Narcotics Section, is presumably in charge of supervising the actions of numerous other prosecutors. The Southern District of New York is already an active district, with a substantial case load. The fact that the government now knows that its *stealth* actions to *worsen* a defendant's custodial term means that myriad defendants' due process rights, both substantive and procedural, are at stake. For this reason, the Court should grant review.

III

AGREEING TO THE DISTRICT COURT'S JURISDICTION TO REVIEW THE ADMINISTRATIVE AGENCY'S DENIAL OF RELIEF WAS NOT A "WAIVER" OF "PROCEDURAL" RIGHTS

When petitioner's administrative review petition, filed with the BOP on October 8, 2002, was not reviewed by BOP, who later advised the prosecutor that it would not be

responding at all, *see* October 30, 2002, hearing transcript, petitioner filed a motion in the district court to review such effective denial of relief by BOP. The district court stated it would assert "jurisdiction" if the parties agreed to address the merits of the dispute, and petitioner so agreed.

The Court of Appeals has incorrectly characterized such action as a "waiver" of procedural issues, including whether the prosecutor's *stealth, ex parte* telephone calls were proper, stating that "Efrosman's waiver extinguishes our review authority." However, the record below shows that there was no waiver of the question as to the *constitutionality* of the BOP's wrongful deprivation of credit which had already vested, and the related issue of the prosecutor's improper telephone calls. Accordingly, the Second Circuit's reliance on *United States v. Olano*, 507 U.S. 725, 733 (1993), is grossly misplaced.

CONCLUSION

For the foregoing reasons, the Court should grant certiorari and, upon review, reverse the Court of Appeals for the Second Circuit.

Dated: June 26,-2003

Respectfully submitted,

MICHAEL S. KIMM

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 28th day of March, Two Thousand and Three.

PRESENT: HONORABLE Wilfred Feinberg, HONORABLE Fred I. Parker, HONORABLE Sonia Sotomayor, Circuit Judges.

No. 02-1658

UNITED STATES OF AMERICA,

Appellee,

v.

ALEXANDER EFROSMAN,

Defendant-Appellant.

APPEARING FOR APPELLEE: Douglas R. Jensen, Esq. U. S. Attorney's Office Southern District of New York New York, NY

APPEARING FOR DEFENDANT-APPELLANT: Michael S. Kimm, Esq. Hackensack, NJ Appeal from the United

States District Court for the Southern District of New York (Jed S. Rakoff, Judge).

Efrosman's petition, filed pursuant to 28 U.S.C. § 2255, challenged the propriety of the BOP's execution of his sentence, not the legality of the district court's imposition of his sentence. Placing substance over form, *see Cook v. New York State Div. of Parole*, ___ F. 3d ___, 2003 WL 462410 at *3 (2d Cir. Feb. 25, 2003), the petition is properly construed as brought under 28 U.S.C. § 2241, *see Chambers v. United States*, 106 F. 3d 472, 474-75 (2d Cir. 1997) (holding that petition relating to calculation of credit for time served during federal detention was properly brought under § 2241).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the Order of the district court is AFFIRMED. Defendant-appellant Alexander Efrosman appeals from a final order dated November 5, 2002 in the United States District Court for the Southern District of New York (Jed S. Rakoff, Judge), denying his petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2241.1 Efrosman challenged a decision by the Bureau of Prisons (" BOP") to deny him credit against his federal sentence for some or all of the time spent incarcerated in France on unrelated charges. Efrosman's petition sought an order from the district court compelling the BOP to grant this credit pursuant to 18 U.S.C. § 3585(b). Reviewing the district court's denial of habeas corpus de novo, *Cook*, ___ F. 3d ___, 2003 WL 462410 at *3, we note first that, despite Efrosman's "about-face" on appeal, his clear and unequivocal waiver of any and all procedural challenges before the district court in order to expedite a decision on the merits of his sentencing credit claim controls. Efrosman's waiver extinguishes our review

authority. *See United States v. Olano*, 507 U. S. 725, 733 (1993). Turning to the merits of the petition as decided by the district court, we find the district court properly disposed of Efrosman's principal argument seeking 15 months confinement credit, pursuant to 18 U.S.C. § 3585(b), against his federal sentence for time spent incarcerated in a French prison on an unrelated conviction, during the latter portion of which Efrosman was contemporaneously awaiting extradition to the United States. Efrosman seeks relief to which he is clearly not entitled. Section 3585(b) provides, in pertinent part, that "[a] defendant shall be given credit toward the service of a term of imprisonment for any time he has spent in official detention . . . that has not been credited against another sentence." 18 U.S.C. § 3585(b). Efrosman received a 15-month sentence for his criminal conviction in France. Efrosman then served the entire 15-month sentence in a French prison. It cannot be more clear that Efrosman received credit for the entire 15 month period of incarceration against his French sentence. That this period of incarceration may have overlapped with time spent detained pending extradition is of no moment. Efrosman's incarceration abroad, according to the district court, stemmed first and foremost from his criminal conviction abroad and there was no credible evidence to the contrary. The district court's factual findings on this matter are entitled to great deference, as they are not clearly erroneous. *See* Fed. R. Civ. P. 52(a). Because the totality of Efrosman's 15-month incarceration in France was credited against the totality of the 15-month French sentence imposed, Section 3585(b) precludes Efrosman from also receiving 15-months confinement credit against his federal sentence in the United States. *Cf. United States v. Labeille-Soto*, 163 F. 3d 93, 99 (2d Cir. 1998) (§ 3585 does not

permit credit on federal sentence for time already credited against prior state sentence). The district court also properly disposed of Efrosman's alternative argument that he was entitled to a 7½-month credit against his federal sentence because he would likely have served only half of his 15-month term if it were not for the extradition detainer. We agree with the district court that there was no meaningful evidence to support that argument. For the reasons stated above, the district court's Order denying Efrosman's habeas petition is hereby AFFIRMED.

FOR THE COURT,
Roseann B. MacKechnie, Clerk

By: Oliva M. George, Deputy Clerk

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,	:	
-v-	:	00 CR. 0736 (JSR)
ALEX EFROSMAN, Defendant.	:	ORDER

JED S. RAKOFF, U.S.D.J.

Defendant seeks (in what might liberally be interpreted as a petition under § 2255) to challenge a last-minute determination of the Bureau of Prisons to deny him credit against his federal sentence of some or all of the period of his incarceration in France for which the Bureau had previously credited him. Although defendant's application is procedurally irregular in numerous respects, the Court, because of the time constraints that make any remand to the Bureau futile, and on consent of both sides, *see* transcript, October 31, 2002, reaches the merits.

Having done so, however, the Court concludes that the Bureau's most recent determination was correct. While the equivalent of a federal detainer was lodged against defendant in France, a close reading of the French documents shows that the time spent by defendant in French prison for which he now seeks credit was actually spent serving his French sentence for an unrelated offense. As for the affidavit of defendant's French lawyer alleging that, but for the detainer, defendant would have been released after serving only half his

French sentence, so that the remaining time should be viewed as extradition custody and therefore credited, the affidavit, which is extremely brief and cites no authority, is far too conclusory to be entitled to any weight.

Accordingly, defendant's application is denied.

SO ORDERED.

/s/ Jed S. Rakoff
JED S. RAKOFF, U.S.D.J.

Dated: New York, New York
November 5, 2002

UNITED STATES DISTRICT COURT

Southern District of New York

UNITED STATES OF AMERICA

V.

ALEX EFROSMAN

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

Case Number:
1:00CR0736-01 (JSR)

Jay Fahy, Esq.
Defendant's Attorney

THE DEFENDANT:

[X] pleaded guilty to count(s) **1-19**

[ ] pleaded nolo contendere to count(s) _____ which was accepted by the court.

[ ] was found guilty on count(s) _____ after a plea of not guilty.

Title & Section	Nature of Offense	Date Concluded	Count Number(s)
18 U.S.C. 1341	Mail fraud	08/28/1995	1
18 U.S.C. 1341	Mail fraud	09/05/1995	2
18 U.S.C. 1341	Mail fraud	10/07/1995	3
18 U.S.C. 1341	Mail fraud	11/17/1995	4
18 U.S.C. 1341	Mail fraud	11/28/1995	5
18 U.S.C. 1341	Mail fraud	12/11/1995	6
18 U.S.C. 1343	Wire fraud	07/28/1995	7

The defendant is sentenced as provided in pages 2 through 8 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

[ ] The defendant has been found not guilty on count(s) _____

[ ] Count(s) _____ [ ] is [ ] are dismissed on the motion of the United States.

IT IS FURTHER ORDERED that the defendant shall notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Defendant's Soc. Sec.
050-58-6126

Defendant's Date of
03/14/1962

Defendant's USM No.:
48911-054

Defendant's Residence Address:

2840 Ocean Parkway, Apt. 17G
Brooklyn, N.Y. 11235

Defendant's Mailing Address:

Same as above

November 1, 2000
Date of Imposition of Judgment

/s/ Jed S. Rakoff
Signature of Judicial Officer

Hon. Jed S. Rakoff, U.S.D.J.
Name & Title of Judicial Officer

11/2/00
Date

ADDITIONAL COUNTS OF CONVICTION

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
18 U.S.C. 1343	Wire fraud	09/18/1995	8
18 U.S.C. 1341	Mail fraud	03/01/1997	9
18 U.S.C. 1341	Mail fraud	03/20/1997	10
18 U.S.C. 1341	Mail fraud	04/16/1997	11
18 U.S.C. 1341	Mail fraud	05/14/1997	12
18 U.S.C. 1341	Mail fraud	05/22/1997	13
18 U.S.C. 1341	Mail fraud	07/14/1997	14
18 U.S.C. 1343	Wire fraud	06/13/1997	15
18 U.S.C. 1343	Wire fraud	07/17/1997	16
18 U.S.C. 1343	Wire fraud	07/22/1997	17
18 U.S.C. 1343	Wire fraud	07/24/1997	18
18 U.S.C. 1343	Wire fraud	07/31/1997	19

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of 63 months

[X] The court makes the following recommendations to the Bureau of Prisons:

The Court recommends that the defendant be incarcerated [sic] **a facility near to his family.**

[X] The defendant is remanded to the custody of the United States Marshal.

[ ] The defendant shall surrender to the United States Marshal for this district.

[ ] at _____ [ ] a.m.[ ] p.m. on _____ .

as notified by the United States Marshal.

[ ] The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

[ ] before 2 p.m. on _____ .

[ ] as notified by the United States Marshal.

[ ] as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

_____

_____

_____

Defendant delivered on _____ to _____ at _____ , with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
Deputy U.S. Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of 3 years.

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state, or local crime.

The defendant shall not illegally possess a controlled substance.

For offenses committed on or after September 13, 1994:

The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as directed by the probation officer.

[X] The above drug testing condition is suspended ~~based on the court's determination that the defendant poses a low risk of future substance abuse~~. (Check, if applicable.) SEE PAGE 4

[X] The defendant shall not possess a firearm as defined in 18 U.S.C. § 921. (Check, if applicable.)

If this judgment imposes a fine or a restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine or restitution that remains unpaid at the commencement of the term of supervised release in accordance with the Schedule of Payments set forth in the Criminal Monetary Penalties sheet of this judgment.

The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). The defendant shall also comply with the additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;

2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer ten days prior to any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

SPECIAL CONDITIONS OF SUPERVISION

1. The defendant is to report to the nearest probation office within 72 hours of his release from custody.

2. The defendant shall participate in a program approved by the United States Probation Office for substance abuse, which program may include testing to determine whether the defendant has reverted to the use of drugs or alcohol. The defendant will be required to contribute to the costs of services rendered (copayment) in an amount to be determined by the probation officer, based on ability to pay or availability of third party payment.

3. The defendant shall make restitution in the amount of $4,684,031.66 to the victims listed on the restitution pages of this judgment. Restitution is to be paid at a rate of 10% of the defendant's gross monthly income. Payments are to begin 30 days after the defendant's release from custody.

4. The defendant shall cooperate with INS in the event that any proceedings are scheduled to determine his status in the U.S.

5. The defendant is to be supervised in the district of his residency.

CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties in accordance with the schedule of payments set forth on Sheet 5, Part B.

	Assessment	Fine	Restitution
Totals:	$ 1,500	$	$ 4,684,031.66

[ ] If applicable, restitution amount ordered pursuant to plea agreement . . . .$ _____

FINE

The above fine includes costs of incarceration and/or supervision in the amount of $ $_____.

The defendant shall pay interest on any fine of more than $2,500, unless the fine is paid in full before the fifteenth day after the date of judgment, pursuant to 18 U.S.C. § 3612(f). All of the options on Sheet 5, Part B may be subject to penalties for default and delinquency pursuant to 18 U.S.C. § 3612(g).

[ ] The court determined that the defendant does not have the ability to pay interest and it is ordered that:

[ ] The interest requirement is waived.

[ ] The interest requirement is modified as follows:

RESTITUTION

[ ] The determination of restitution is deferred until _____. An Amended Judgment in a Criminal Case will be entered after such a determination.

[X] The defendant shall make restitution to the following payees in the amounts listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportional payment unless specified otherwise in the priority order or percentage payment column below.

Name of Payee	*Total Amount of loss	Amount of Restitution Ordered	Priority Order or Percentage of Payment
SEE ATTACHED RIDER			
Totals:	$ 4,684,031.66	$ 4,684,031.66	

* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994 but before April 23, 1996.

SCHEDULE OF PAYMENTS

Payments shall be applied in the following order: (1) assessment; (2) restitution; (3) fine principal; (4) cost of prosecution; (5) interest; (6) penalties.

Payment of the total fine and other criminal monetary penalties shall be due as follows:

A [X] in full immediately; or

B [ ] $ _____ immediately, balance due (in accordance with C, D, or E); or

C [ ] not later than _____ ; or

D [ ] in installments to commence _____ days after the date of this judgment. In the event the entire amount of criminal monetary penalties imposed is not paid prior to the commencement of supervision, the U.S. probation officer shall pursue collection of the amount due, and shall request the court to establish a payment schedule if appropriate; or

E [ ] in _____ (*e.g., equal, weekly, monthly, quarterly*) installments of $ _____ over a period of _____ year(s) to commence _____ days after the date of this judgment.

The defendant will be credited for all payments previously made toward any criminal monetary penalties imposed.

Special instructions regarding the payment of criminal monetary penalties:

Restitution is to be paid in accordance with schedule set on page five of this judgment.

[ ] The defendant shall pay the cost of prosecution.

[ ] The defendant shall forfeit the defendant's interest in the following property to the United States:

Unless the court has expressly ordered otherwise in the special instructions above, if this judgment imposes a period of imprisonment payment of criminal monetary penalties shall be due during the period of imprisonment. All criminal monetary penalty payments, except those payments made through the Bureau of Prisons' Inmate Financial Responsibility Program are to be made as directed by the court, the probation officer, or the United States attorney.

STATEMENT OF REASONS

[X] The court adopts the factual findings and guideline application in the presentence report.

OR

[ ] The court adopts the factual findings and guideline application in the presentence report except (see attachment, if necessary):

Guideline Range Determined by the Court:

Total Offense Level: 24

Criminal History Category: I

Imprisonment Range: 51 to 63 months

Supervised Release Range: 2 to 3 years

Fine Range: $ 10,000 to $ $10,000,000

[X] Fine waived or below the guideline range because of inability to pay.

Total Amount of Restitution: $ 4,684,031.66

[ ] Restitution is not ordered because the complication and prolongation of the sentencing process resulting from the fashioning of a restitution

order outweighs the need to provide restitution to any victims, pursuant to 18 U.S.C. § 3663(d).

[ ] For offenses committed on or after September 13, 1994 but before April 23, 1996 that require the total amount of loss to be stated, pursuant to Chapters 109A, 110, 110A, and 113A of Title 18, restitution is not ordered because the economic circumstances of the defendant do not allow for the payment of any amount of a restitution order, and do not allow for the payment of any or some portion of a restitution order in the forseeable future under any reasonable schedule of payments.

[ ] Partial restitution is ordered for the following reason(s):

[X] The sentence is within the guideline range, that range does not exceed 24 months, and the court finds no reason to depart from the sentence called for by application of the guidelines.

OR

[ ] The sentence is within the guideline range, that range exceeds 24 months, and the sentence is imposed for the following reasons:

OR

[ ] The sentence departs from the guideline range:

[ ] upon motion of the government, as a result of defendant's substantial assistance.

[ ] for the following specific reason(s):